SOME SUGGESTIONS CONCERNING "LEGAL CAUSE" AT COMMON LAW.[1]

It is my purpose to discuss that problem of delimiting responsibility at common law for consequences of a wrongful act or omission which usually is masked under the topics "Legal Cause" or "Proximate Cause;" to explain what to me seems to be the principle involved; and to draw some conclusions concerning the practicability of formulating this part of our law into rules.

I may assume a concession by my readers that we have to deal with a subject in a chaos of confusion and uncertainty. There may be found in the volumes that have been written on it some unconvincing reasons why a person should not be responsible for *all* the consequences of his wrongful act or omission, and various attempts to state an adequate rule of decision; but a satisfactory suggestion of either rule or principle will be sought in vain. Yet every year our Courts decide hundreds of cases involving disputed questions of "legal cause;" and neither they nor we would find much difficulty, after thorough discussion and careful consideration, in coming to a common conclusion concerning most concrete examples of the problem. Why then do we find perplexity over what is evidently a very important branch of jurisprudence? To answer this query will at least show us what to avoid. Let us make it our first task.

The method of investigating the problem of "legal cause" usually adopted is to examine cases for the purpose of extracting from the opinions of the judges a statement of the "principle" on which the case "is rested" or the "general rule" of which the case is "an illustration." The "facts" on which the judgment of the Court was rendered are looked at merely to ascertain what portions of the opinion are "decision" and what are "dicta." The postulation in an opinion of a "rule" or of a "principle" is deemed "decision" when a majority of the judges have expressed or im-

[1]The limitations of space for an ordinary contribution to a legal periodical and the breadth and complexity of the topic of "legal cause" prohibit adequate detailed exposition in this form. I offer only some general ideas concerning the nature and scope of the problem presented, which I have evolved from my study of cases and found helpful. My purpose is suggestion and not detailed exposition; and therefore I barely have sketched what I judged a sufficient indication of my ideas, leaving to the skill and patience of the reader the critical development and examination of details prerequisite to intelligent acceptance or rejection.

plied that they based upon it their determination of the case or of some component question involved. The presentation of a bird's-eye view of the topic is attempted by a manipulation of these abstractions. The theory of this method of analysis is that we should look for the law of a case at the generalizations which the majority of the judges have expressed or implied by way of "decision." Whatever may be said of the soundness of the method, it is the proximate cause of a kaleidoscope of "rules" of which each confessedly is subject to indefinite exceptions and not one is based on a satisfactory foundation. Is the theory underlying it sound? To form an intelligent opinion on this question, it is necessary to recollect correct conceptions of the nature and proper definition of legal rights and duties and of principles and rules of law.

LEGAL DUTIES ARE ALWAYS CONCRETE.

For the purposes of society, official government insures to persons rights bounded and defined by the impinging rights of others and maintained by the imposition of corelative duties. It imposes a duty by standing ready either to enforce specifically it or some supplementary obligation imposed for a breach; or to sustain the obligee in vindicating his correlative right by self-help. Rights and duties always are concrete. A right presupposes possible opposition. A duty is owed to some person or persons.[2] Therefore, before one or the other is defined completely, we must know against whom the right exists or to whom the duty is owed, and what concrete "thing" is demanded. These are elementary facts of the greatest importance to a proper comprehension of our common law system of jurisprudence; and yet the last four have been so befogged by our usage of discussing legal problems abstractly that I suppose many of us will hesitate to accept them. "What of the 'right of ownership' in a certain parcel of land; or of the 'right of self-defense;' or of the 'duty not to infringe the rights of others;' or of the 'duty to use due care not to damage another?'" The "right of ownership" in a certain parcel of land is not *a right,* but a bundle of rights which for purposes of convenience are treated as a unit;[3] the "right of self-defense" is an abstract

[2]The "person" may be the State (as, for instance, in the case of duties not to commit a crime).

[3]To test this, let us analyze ownership. To own means to have as proprietor. The "thing" owned is called property. The word may be used with reference either to physical objects or to rights. Property rights are the result of law, and often, but not always, relate to specific physical

generalization of a multitude of rights to do or omit concrete things under concrete contingencies; the "duty not to infringe the rights of others" (if the phrase is interpreted broadly) is merely an omnibus abstract concept of all the duties of a person, present or prospective; the "duty to use due care not to damage another" is a vague abstract generalization of an indefinite mass of duties. Under certain assumed circumstances, it is X's duty not to strike P. Under other concrete circumstances, it is X's duty not to approach C in a certain threatening manner. We may generalize these and an infinite number of other obligations by saying it is X's duty not to commit a wrongful assault. When we have done this, we have not stated a duty of X additional to the infinite number on which the generalization is based; we merely have formed a compendious indication of these multitudinous contingent duties as a convenient implement of memory, reasoning, and exposition. The so-called "duty" is not a duty, but an abstract concept of a class of duties.[4] Judges, then, are dealing with abstractions when they talk of "duties" in general terms; and they use these abstractions merely as convenient intellectual instruments in the task of determining and explaining the existence and content of specific duties under concrete ascertained or assumed circumstances. This brings us to consider what constitutes law, and especially how legal duties are determined and defined. We shall have occasion to recur to the ideas we have been considering, and

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objects. They are of innumerable sorts. An owner always has not merely one concrete right, but a "bundle" of rights. For instance, the owner of a negotiable note has in addition to the right of payment from the obligor, the rights that this, that, or the other person shall not interfere in any of various concrete ways with the control or fruition of the obligation; and numerous other rights. Taken together these rights constitute his ownership. An owner may part with many of his rights—for instance, to a mortgagee—and still remain owner of the "thing;" but a nucleus of them is essential to ownership. So an owner of a certain lot of land is owner because he has a sufficient number of rights concerning the land in his "bundle" to bring it within the limits which the law prescribes for ownership of land. The "bundle" may include innumerable concrete rights exercisable in different contingencies, which we classify into smaller "bundles" with such abstract labels as "the right to be free from nuisances", "the right to be free from wrongful trespass", "the right to convey", etc.

[4]That duties always are concrete may be doubted for a moment when we think of duties *to do* one of several or more positive concrete "things" having common essential characteristics—for instance, a trustee's duties with respect to investment of trust funds. Because it is immaterial which of the concrete series of acts is done if these essential characteristics are present, it is natural to conceive that the duty is to bring about an abstraction—these common characteristics. But the content of the duty is necessarily a concrete series of acts—this, that, or the other. The abstraction is only a compendious concept of these alternative courses of conduct.

their practical importance will grow apparent, I think, when we come to analyze our problem.

Law Consists of Concrete Governmental Dictates.

The law of a State consists of the dictates of its organized government. Our government affords in Courts of justice an agency for ultimately determining its dictates, as between parties to a controversy over their respective rights and duties in most concrete situations. Let us confine our discussion to such law as may be so determined. Then we may say that a person's duty towards another in any concrete situation is what the Courts, acquiring jurisdiction of a suit between them involving the question, would adjudge it to be; or, to broaden the statement, the law of the present is determined by potential adjudications. How then are we to ascertain the law? To ascertain the law means to forecast what the Courts would adjudicate; and no lawyer, however learned and sagacious, can prophesy with absolute certainty what Courts will decide upon a complicated question. A wise man cannot *know or learn* the law of an undecided, difficult, concrete case; but an intelligent man can acquire an understanding of the methods, considerations, and influences which guide Courts to a determination of law. The breadth and depth of this understanding will regulate his ability to estimate accurately what the law is. A lawyer may be compared to a pilot, who cannot foretell with absolute certainty what is to happen to his ship, but who understands the usage of the elements, the topography of the coast, and the management of his charge.

How Judges Define Duties.

Judges define duties involved in the cases before them by weighing and balancing a complexity of pertinent considerations. In so far as valid legislation is found applicable, it is a controlling factor. Generally these enactments are abstract precepts from which the concrete law of specific situations is to be deduced. Frequently they are mere vague indications which leave considerable latitude for the exercise of judicial wisdom. When legislation is lacking or fails to control, the common law guides the judgment. The common law has been designated a system of principles and rules. If we remember that many of these "principles and rules" have never been stated at all; that many have been stated only inaccurately; and that many are subjects for mere conjecture,—

the designation will not prove wholly delusive. The best understanding of what the common law is can be gained by noting how the Courts determine it.

THE COMMON LAW IS A MASS OF CONCRETE JUDGE-MADE GOVERNMENTAL DICTATES—NOT A SYSTEM OF PRINCIPLES AND RULES.

The common law leaves Courts free to decide cases and define duties as considerations of justice and public policy[5] dictate, except in so far as they are fettered by regard for precedent and a tradition that any but the most gradual and conservative innovation is work legislative, not judicial, in character. To this regard for precedent, especially as it appears crystallized in the doctrine of *stare decisis,* is due the stability and coherence which make the common law a system. The justification of the doctrine is that stability and coherence in successive adjudications are necessary to the efficiency of a modern system of law; for in order to regulate their affairs men must be able to ascertain with reasonable certainty what the Courts would decide as to their rights and duties. Therefore, to the extent that a Court of appeal deems that in previous cases points of law like or similar to those involved in the case in hand have been adjudicated, those adjudications will be controlling factors; except in the unusual event when it decides that the previous determinations were erroneous and that justice demands an overruling. It should not be conceived, however, that the determinations in the previous cases constitute law for the case in hand. The law of the case in hand is determined by the adjudication of that case; the decisions in the previous cases are merely a controlling consideration towards a similar decision.

Regard for coherency often leads Courts to consider the law on related questions; and this involves examination of previous cases on these collateral points. Decisions of Courts of other jurisdictions, when "in point," are also valuable indications of

[5]Among the other considerations of policy weighing with Courts may be mentioned custom and usage. So strong an influence does custom have in the formation of law that it frequently is mentioned as an important "source" of law. The potency of this influence over the decisions of our judges is one example of a fundamental principle of good government—that when no stronger considerations conflict, the wheels of society should not be forced from an accustomed groove.

possible judgments, if no satisfactory "authority" exists in the same jurisdiction.

PRINCIPLES AND RULES OF LAW ARE ABSTRACT CONCEPTS. THEY ARE NOT LAW, BUT INTELLECTUAL IMPLEMENTS USEFUL IN THE MENTAL PROCESSES OF DETERMINING AND SYSTEMATIZING LAW.

Being such important factors in the determination of law, previous decisions are essential aids to the formation of correct conceptions and statements of particular principles and rules of law. A principle of law is an abstract consideration of justice or policy which will weigh with the Courts in the final decision of a case to which it is applicable. A rule of law is an abstract generalization of what the Courts would decide concerning a circumscribed question. Neither principles nor rules of law are derived entire and ready for use from the clouds or some other mysterious place of incubation. They are formed by inductive and deductive reasoning based upon empiric knowledge. Why is it a principle of law that no man ought to take another's property without his consent? Because our forefathers learned ages ago by experience of specific events that society best accomplishes its purposes through protecting the individual in the enjoyment of what he rightfully has acquired; and therefore our Courts have adopted this experience-bought precept as an axiomatic principle of law. Why is it a principle of law that a principal obligor ought to indemnify his surety? Because Courts have found and will continue to find in considering concrete cases that justice demands that A, the principal obligor, be compelled ultimately to bear this specific loss rather than B, the surety. The principle in either instance is a generalization from concrete decisions. Similarly, a rule of law is assembled from the specific law of concrete situations. That a master shall be responsible for the torts of his servant committed against persons not fellow-servants "within the scope of his employment" is a rule of law because in concrete cases the Courts always would decide that a specific master is liable for such a specific wrong committed by a specific servant "in the scope of his employment." In short, principles and rules of law are merely convenient means of consolidating and welding a multitude of concrete judicial considerations or of governmental dictates concerning duty, right, or requirement in concrete situations.

ACTUAL PRINCIPLES AND RULES OF LAW CAN BE FORMULATED ONLY BY CAREFUL ANALYZATION OF CONCRETE CASES. JUDICIAL GENERALIZATIONS ARE NOT NECESSARILY CORRECT INDICATIONS OF LAW.

It should be observed that a statement of an assumed principle or rule of law, acquiesced in by a majority of the judges of a Court as a basis for its disposal of a case, is not necessarily a correct statement of a principle or rule. The test of the existence of a rule is not what the judges say abstractly in one case or in many, but what the Courts of a jurisdiction would *adjudge concretely* in every case coming within the limits of the proposed "rule." A concept is a principle of law for the case in which it is announced, only if it *actually* weighed with a majority of the judges in their determination of the case; it is a principle for other cases only in so far and so long as the Courts indorse it, not merely by restating it in the opinions, but by allowing it to be a factor in the adjudication. That the function of Courts is to decide concrete cases, not to promulgate abstract concepts of law, must be remembered if we are to appreciate the opinions of judges. The comprehension and proper statement of a complicated principle or rule requires in addition to facility in the correct use of language, an active controllable imagination, sound logic, careful discrimination, and, above all, intense and patient application. The combination of these qualities is rare; furthermore, the exigencies of judicial duties neither afford the time nor include the necessity for indulgence of a capacity for wide, accurate generalization. Experience of the ordinary affairs of men, and especially of the business world, capacity for determining what the practical requirements of society dictate in concrete instances, clear-headed reasoning, ability to put aside prejudice and individual bias, honesty, and a good measure of the saving grace of hard common-sense—these are the essentials of a competent judge; and these in combination with a wide knowledge of "concrete law" and careful scrutiny of decided cases lead to a just disposal of most of the suits which come before our Courts of appeal, though judicial opinions seldom contain broad precepts which are accurate both in concept and statement.

If what I have said is correct, the theory that we should look for the law of a case only at the abstractions which a majority of the judges have expressed or implied by way of decision is wrong;

and confusion is its natural product.[6] What, then, is the proper method of investigation? To regard a decided case, not as a background for an abstract principal or rule, but as a concrete, practical problem in government with a solution attached; to analyze and study the problem until it and the considerations applicable are understood; then to note the solution; and to interpret and appreciate the opinion, purporting to contain an indication of the reasons which impelled the decision, in the light of this understanding of problem and solution. When we comprehend a number of concrete cases, we are in a position to induce generalizations, but always with careful circumspection.

DIVISION OF PROBLEM OF "LEGAL CAUSE" INTO TWO BRANCHES.

Let us now consider our problem. When we were discussing the nature and definition of legal duties, I stated that a duty always is concrete and is owed to some person or persons, and that it never is defined completely until that person or those persons are indicated. This is axiomatic. Here is a correlative axiom. In order that a plaintiff may recover in a suit based upon an alleged injury to himself, it must appear that some duty which the defendant owed *him* has been violated; that the defendant wronged some one else and that the plaintiff has been damaged as a result is not sufficient. This suggests a simplification of our investigation. We may divide our problem into two. They are:

I.—For what consequences of an act or omission which con-

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[6]To this mistaken superficial method of analyzing a case is due the impression prevalent among some lawyers that the Courts of a jurisdiction frequently are inconsistent in successive adjudications. There is considerably more talk of decisions being "overruled" than a correct analysis would justify. It frequently is easy to determine what is right in a concrete case, but very difficult to analyze correctly and to abstract the cause of our determination. Our judgment often acts instinctively without the slow process of reasoning and leaves us sure of the validity of the result, but uncertain or mistaken as to the justification. Too much importance usually is attached to judicial generalizations which evidently are due to this common mental phenomenon and to the lack of time and the necessity for patient analysis and careful exposition,—(often with disappointing results to the young lawyer.) There are even not rare cases in which Courts have been misled into unwise decisions by giving too much weight to erroneous reiterated statements of "principles" and "rules" and venerable phraseological hocus-pocus.

If we are to comprehend our law, we must not be deluded into the idea that it consists of rules and principles. It is a mass of concrete governmental dictates. A principle of law is not law, but an abstract premise in the determination of law. A rule of law is an abstract concept of a portion of the mass of infinite concrete dictates which compose law in its entirety. There were legal questions and decisions long before there were stated and recognized legal rules or principles.

stituted a breach of a legal duty owed *plaintiff* is defendant responsible to plaintiff?

II.—For what consequences of an act or omission which constituted a "legal" default towards *some other person* is defendant responsible to plaintiff?

We shall find that these questions, when they are presented in the form of concrete cases, bear a resemblance to each other; but the problems they present are different in that a "legal" wrong to plaintiff is postulated in the first and not in the second, and therefore the considerations bearing on the solution of the second have to cover a wider field than that of the first question. Let us leave discussion of the second until we have come to some determination concerning the first.

DEFINITIONS OF "CAUSE" AND OF "CONSEQUENCE." NO QUESTION OF CAUSE AND CONSEQUENCE INVOLVED IN OUR PROBLEM.

Before we proceed, we may as well ascertain what we mean by "consequences;" and also define the correlative term "cause," which plays an important part in the literature of the subject. In a scientific sense, every status is a consequence not merely of one cause, but of every contributory antecedent force and condition of which it is the resultant; and conversely, no condition or force was the sole cause of a given status though it may have been a contributing cause. For the purposes of our discussion, let us postulate the following definitions:

A condition, force, or omission was a cause of a status if that identical status would not have occurred but for the contribution of the condition, force, or omission.

A status is a consequence of a specified force, condition, or omission, if that force, condition, or omission was one of the causes which contributed to produce the status.

For example, suppose that A should kill B by stabbing him with a knife. The manufacture of the knife, the mining of the ore from which it was made, the natural forces which produced the ore, the births of A's grandfather and of B's parents, B's presence on the spot where the stabbing occurred—these and an infinite number of other forces and conditions would be causes of B's death; and conversely, B's death would be a consequence of each of these causes.

The word "cause" is used commonly, however, with a qualified meaning. In the case supposed in the preceding paragraph,

a physician would say that the cause of B's death was the wound made by the knife; and a moralist or a lawyer would say that the cause was the stabbing act of A. All three would speak, not of causes of the result in general, but of cause or causes with a tacitly understood modification. It is apprehended tacitly that the physician speaks of causes from a medical standpoint; that the moralist speaks concerning moral responsibility; and that the lawyer speaks concerning legal responsibility. No investigation is an attempt to ascertain all the causes of a status or occurrence. Ordinarily the limits are closely circumscribed; and this circumscription always is postulated tacitly when the "cause" or "causes" are given or asked without express modification of the word. When judges state that the scope of their inquiry is to ascertain whether defendant's wrongful conduct was "the cause" or "the legal cause" of the damage to plaintiff, there is an instance of this usage. Their task is to determine whether defendant's wrongful act or omission was not merely a cause, but a cause under such circumstances as to render him legally responsible to plaintiff for the specific consequence or consequences—or, metaphorically, a "legally blamable" cause. To this elliptical and reverse manner of stating the problem, we owe a great deal of confusion. It naturally induces misapprehension that the inquiry in any concrete instance concerns only some subtle distinction between different kinds of causes in "the chain of causation," and thus distracts attention from important facts—the peculiar characteristics and circumstances of the concrete act or omission constituting the breach of duty. We cannot emphasize too strongly that we have to deal with no question of cause or consequence. Our problem postulates that in each case the occurrences of which complaint is made were consequences of defendant's wrongful act or omission and, conversely, that the act or omission was a cause of the occurrences. This connection is a primary requisite of responsibility. We are discussing an additional requisite—that the specific consequences come within the limits of defendant's responsibility for his wrong.

SUMMARY OF CASES ON FIRST BRANCH OF OUR PROBLEM FOR THE PURPOSE OF AIDING THE INDUCTION OF THE PRINCIPLE UNDERLYING THE PROBLEM OF "LEGAL CAUSE."

What is the principle, or what are the principles, indicating the proper solution of the first part of our problem? Let us examine some cases and see whether from comprehension of the

particular considerations determining the decision of them, we can induce an answer.

Plaintiff owns two houses, A and B, near the bank of a stream. A is on a lot next below one belonging to defendant. B is a mile farther down. Defendant negligently builds a fire on his lot so near A as to put it in peril from sparks. However, A is saved by vigorous efforts. The fire unavoidably spreads through the grass to a stream and ignites oil floating on the surface. The oil has been spilled into the stream in large quantities by accident. This was unknown to defendant; and he was not negligent in not knowing or foreseeing that the oil was there. The oil carries the fire down-stream and B is burned.

I suppose we shall agree that plaintiff cannot recover from defendant for the loss of B, though the building of the fire constituted a breach of a legal duty owed plaintiff and B was burned as a consequence of the wrongful act. Why not? "The damage is too remote," is the conventional answer. But why too remote? The ignition of the oil was the unavoidable result of building the fire and the burning oil was a very "near" cause of the loss. The chain is not long, certainly. "But an intervening cause, the agency which put the oil on the stream, makes the damage too remote." Why? If defendant had known that the oil was there when he built the fire, he ought to be held responsible for the loss of B. This knowledge would not make the consequence less remote in any usual sense. Why should defendant be liable in this case and not in the other? If he had known that the oil was in the stream, we and a Court could say that he ought not to have built the fire as he did, because through the unavoidable ignition of the oil, property down-stream (and up), as far as the oil might extend, would be endangered. Or, to change the phraseology, the knowledge would make it fair to charge him with "legal" negligence towards plaintiff with respect to the destruction of B.[7] If there was not that knowledge, it is not fair to charge him with "legal" negligence with respect to this loss; and his negligence as regards A cannot be laid hold of to charge him with the damage to B merely because both houses happen to belong to the same owner. If this is the correct explanation of the obvious solution, we have no question of remoteness of consequence, but a question of

[7]This suggests the question: "What is 'legal' negligence?" The discussion of it forms the subject of a Supplementary Note, printed at the end of the final instalment of this article (February number of this Volume.)

definition of duty; and a resulting discovery that the prevention of the consequence of which complaint is made is not "within the limits" of any duty that defendant has infringed.

Now assume that A caught fire, not directly, but through the ignition of the oil. Defendant should not be held responsible for the loss. The case is analogous to the one just discussed. There has been an act which was "legal" negligence towards plaintiff because it endangered A, and A has been destroyed as a consequence of the act; but the avoidance of the contingency through which A was destroyed was not within the scope of the duty which defendant has infringed. Not knowing of the presence of the oil on the stream, he committed no "legal" wrong towards plaintiff in causing it to ignite. His wrong consisted only in imperiling A by sparks direct from the fire where he started it.

Denny v. *N. Y. C. R. R. Co.*[8]—Defendant undertook to carry plaintiff's goods from Niagara Falls to Albany, N. Y. It wrongfully delayed the carriage for several days at Syracuse. The goods, while in defendant's hands as warehouseman in Albany, were damaged by a sudden flood. It was contended by plaintiff that they would not have been within reach of the flood but for the wrongful delay. The Court decided in favor of defendant. In his opinion, Merrick, *J.*, gave as a reason for the decision that the flood was "the proximate cause" of the damage and the negligence of defendant only a "remote cause." His justification of this conclusion is not very clarifying. Is not the proper explanation of the decision this:— that the duty to carry the goods with celerity was imposed to avoid losses of the sort which ordinarily follow a tardy receipt by a consignee; not to prevent such an adventitious contingency as produced the damage in this case?[9]

Compare with *Denny* v. *R. R. Co.*,[8] *Fox* v. *Boston & Maine R. R. Co.*[10]—In anticipation of approaching cold weather, defend-

[8](Mass. 1859) 13 Gray 481; 74 Am. Dec. 645.

[9]See Hoadley *v.* Transp. Co. (1874) 115 Mass. 304, 15 Am. R. 106; Daniels *v.* Ballantine (1872) 23 Oh. St. 532; McClary *v.* R. Co. (1873) 3 Neb. 44; St. Louis etc. Ry. Co. v. Ins. Co. (1891) 139 U. S. 223, *accord.*

Cf. Read *v.* Spaulding (1864) 30 N. Y. 630, 86 Am. Dec. 426. (In this case the Court held that a breach of the duty not to delay transportation wrongfully, imposed upon the carrier the risk of the consequential contingency of damage to the goods by a flood *during the carriage.* The wrong was treated as analagous to a wrongful deviation from the contract route); Morris *v.* Davis (1852) 20 Pa. St. 171; Scott et al *v.* Hunter et al. (1863) 46 Pa. St. 192.

See also Lowery *v.* Western Union Tel. Co. (1875) 60 N. Y. 198.

[10](1889) 148 Mass. 220.

ant agreed with plaintiff to deliver a shipment of apples to a connecting carrier within a stipulated limit of time. Defendant negligently delayed delivery and the apples were frozen while in the hands of the second carrier after the date on which plaintiff should have received them. The Court held defendant liable for the damage. As Morton, *C. J.*, pointed out,[11] the damaging contingency was of a sort which should have been anticipated as an ordinary consequence of tardy transportation under the circumstances and which plaintiff sought to avoid by the contract stipulation that defendant broke.

Kennedy v. *The Mayor.*[12]—A complaint alleged that while plaintiff was backing up his cart for the purpose of loading, on a public wharf which the City of New York ought to have made safe, his horse suddenly became unmanageable and, owing to the absence of a string-piece on the edge of the wharf, backed off into the river and was lost in spite of plaintiff's efforts to save it. The complaint was dismissed on the ground that "the unmanageability of the horse and not the absence of the string-piece was the proximate cause of the loss." The upper Court held that this ruling was erroneous. Andrews, *J.*, gives the reasons for the decision as follows:[13]

"The particular ground of the motion, and upon which the Court proceeded in discussing the complaint was, that the unmanageability of the horse, and not the defect in the dock, was the cause of the accident. The plaintiff's counsel desired to go into the proof as to the extent to which the horse was unmanageable, but he was not permitted to do so. It is to be assumed in deciding the question now presented that it was the duty of the city to put a string-piece upon the dock, and that it had negligently omitted to perform it, and also that there was no negligence on the part of the plaintiff in the management of the horse and cart. The duty imposed upon the defendant was imposed for the purpose of protecting persons and animals on the dock from falling into the water. Is the duty of protecting animals by a guard or barrier a duty owing only in respect to animals which at the time of their loss are docile and obedient, and under the absolute control of the owner? We think not. The shying of a horse, his backing or turning in consequence of a sudden fright or other cause, so as to be for a moment beyond the control of the one having him in charge, are among the most common occurrences. That a horse may on a particular occasion do this, neither shows

[11]At p. 222.
[12](1878) 73 N. Y. 365; 29 Am. R. 169.
[13]At p. 367.

that the animal is vicious or generally unsafe, or that the owner is careless. It is against accidents which may happen from these common incidents in the use of horses upon docks that a barrier is especially needed." [14]

Carter v. *Towne*.[15]—Plaintiff, a boy of nine years, went alone to defendants' shop on June 27 and purchased two pounds of gunpowder. He carried it home, and with knowledge of his aunt, who was in charge of him and the house during the absence of his father and mother, placed it in a cupboard in the sitting-room. On July 4, his mother gave him some of the powder to fire in a pistol. On July 9, he took from the cupboard some more of the powder in a flask. Plaintiff testified that this was done with knowledge on the part of his mother; but the mother testified to the contrary. Plaintiff was injured by explosion of the flask when he fired the powder. The trial judge instructed the jury substantially that if there was carelessness on the part of the mother contributing to the possession of the powder by plaintiff on July 9, defendants should have a verdict; but refused to direct a verdict in their favor. The Supreme Judicial Court held that the jury should have been instructed in accordance with defendants' request that there was "no legal and sufficient evidence to authorize them to return a verdict for the plaintiff," because inasmuch as the gunpowder

"had been in the legal custody and control of the plaintiff's parents or, in their absence, of his aunt, for more than a week before the use * * * by which he was injured, * * * the injury was not the direct or proximate, the natural or probable, consequence of the defendants' act." [16]

Defendants' delivery of the explosive into the custody of plaintiff was "legal" negligence towards him[17] because there was evident risk that so young a child might be injured personally or suffer some other "legal" damage by his mismanagement through lack of appreciation of the danger, or inability to use sufficient care.[18] But when it had come under control of the aunt, that risk

[14]Cf. Hill *v.* New River Co. (1868) 9 B. & S. 303, 18 L. T. (N. S.) 355; City of Atlanta *v.* Wilson (1877) 59 Ga. 544, 27 Am. R. 396; Perkins *v.* Fayette (1878) 68 Me. 152, 28 Am. R. 84.

[15](1870) 103 Mass. 507.

[16]*Per* Gray, J.

[17]See Carter *v.* Towne (1868) 98 Mass. 567.

[18]This mismanagement might consist in permitting other irresponsible persons to get control of the powder. Binford *v.* Johnston (1882) 82 Ind. 426.

was over. Thenceforward the care devolved on the adult custodians; and clearly no reason existed why defendants should be made involuntary sureties for their conduct, or for the efficacy of any measures they might take to keep the powder from plaintiff and thus avoid similar risks. Since, therefore, the purpose of defendants' infringed duty owed plaintiff was only the prevention of "legal" damage through the risk created by their wrong, the termination of that risk without damage marked the end of their responsibility.

Burrows v. *March Gas Co.*[19]—Evidence was given in effect as follows. Defendant, under a contract with plaintiff, laid a service pipe to a meter in his house. Defendant turned on the gas to test the pipe, but sent no one to do the testing. The pipe was defective and leaked. One Sharratt, a servant of Bates, a gas-fitter who had the contract for the internal gas-fittings, went down-stairs with a lighted candle to ascertain the cause of the escape. The gas ignited from the flame of the candle, and an explosion resulted, causing damage to plaintiff's property. The jury found that the act of Sharratt was imprudent. Two questions were raised for determination in the Court of Exchequer and in the Exchequer Chamber:— (1) whether the direction of a verdict for plaintiff was correct, and (2) whether the damages caused partly by negligence of Sharratt could be recovered from defendant. Both Courts held that defendant was liable (1) for the accumulation of gas, and (2) for the damage, though it was caused through the negligence of a third person. We have to deal with only the second point.

Defendant's wrong created a situation such that the chances of an explosion through lack of prudence on the part of an investigator of the cause of escape were very strong. Therefore it was just to adjudge substantially that one of the legal purposes of the infringed duty to use due care to prevent the accumulation of gas was the avoidance of the contingency which occurred.[20]

Guille v. *Swan.*[21]—Defendant Guille descended in a balloon on Swan's garden near which he had made his ascent. The car dragged over potatoes and radishes for about thirty feet and a

[19](1872) L. R. 7 Ex. 96; (1870) L. R. 5 Ex. 66.

[20]Koelsch *v.* Philadelphia Co. (1893) 152 Pa. St. 355, 25 Atl. 522; Pine Bluff Co. *v.* McCain (1896) 62 Ark. 118, 34 S. W. 549, *accord.* Cf. Oil City Gas Co. *v.* Robinson (1881) 99 Pa. St. 1; Pine Bluff Co. *v.* Schneider (1896) 62 Ark. 109; Bartlett *v.* Gas Light Co. (1875) 117 Mass. 533.

[21](N. Y. 1822) 19 Johns. 381.

crowd of more than two hundred persons broke through the fences and tramped over vegetables and flowers. Plaintiff sued in trespass. It was held that Guille was responsible not only for the damage done by the car, but also for that done by the crowd. Here again we have a case involving such a breach of duty and circumstances as made very probable some such contingency as occurred. Furthermore, when defendant started his ascent, it was likely that he would land as a trespasser and attract to his landing-place all the curious in the vicinity. Therefore, among other purposes of the duty not to commit this concrete trespass was the avoidance of damage to the garden through the superinduced trespasses of others.[22]

Cobb v. *Great Western Ry. Co.*[23]—Plaintiff made a statement of claim to the effect that he had been robbed in defendant's railway carriage as a result of negligence of defendant "in permitting the said carriage to be overcrowded, and so facilitating the hustling and robbing of the plaintiff." It was held that this statement disclosed no cause of action because the damage was "too remote." Bowen, *L. J.*, and Smith, *L. J.*, gave as reasons that the damage was not the "natural consequence" of overcrowding the carriage; but it is clear that there was nothing extraordinary in the sequence. They and Lord Esher, *M.R.*, who uses first the phrase "naturally and ordinarily" and in the next sentence "probable and ordinary result" to denote the required characteristics, evidently mean to indicate only that danger of such a sequence from simple overcrowding of the railway carriage was not so great that defendant ought to have refrained from overcrowding in order to avoid it. The duty not to overcrowd was imposed for other purposes.

[22]See Beven on Negl. (2nd Ed.) 74-75; Shearman & Redf. on Negl. (5th Ed.) 36, 35 and notes 5 and 6. Notice that the crowd concerned in Guille *v.* Swan probably was composed in large part of those present at the ascension. Cf. Fairbanks *v.* Kerr (1871) 70 Pa. St. 86; Scholes *v.* Ry. Co. (Nisi Prius 1870) 21 L. T. R. (N. S.) 835. The view of the judge in the Scholes case is not necessarily inconsistent with the decision in Guille *v.* Swan. The difference in the occupations which led up to the respective torts is an important consideration. The trespasses involved in Scholes *v.* Ry. Co. were caused by negligence of defendant's servants in prosecution of its important public calling. Furthermore, the trespassers probably all were attracted by curiosity. The defendant in Guille *v.* Swan was engaged in what the Court no doubt considered a foolhardy venture tending only to gratify the curious and idle, and almost certain to end in a trespass. Some of the crowd at least were drawn to plaintiff's land to lend their aid to defendant. In Scholes *v.* Ry. Co., then, there were juridical reasons not present in Guille *v.* Swan for shortening the legal scope of defendant's infringed duty and leaving the responsibility for the trespasses of the crowd solely on the shoulders of its members.

[23]L. R. [1893] 1 Q. B. 459.

Sheridan v. *Brooklyn & Newtown R. R.*[24]—Plaintiff's intestate, a boy of nine years, was compelled by the conductor of defendants' crowded car to give up his seat to another passenger. The boy was jostled about among the people packed in the passageway, out onto the front platform, which was also crowded. While the car was in motion, the rush of a young man to get off threw the boy under the wheels and he received injuries from which he died. The Court held defendant liable. In his opinion Hunt, *J.*, said:[25]

"It may well be that the young man was not justified in rushing through the crowd, and in aiding in throwing the deceased from the cars; but this does not relieve the defendants' wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendants' illegal conduct in overcrowding their car, and in placing the deceased upon the platform that produced the disastrous result. It is no justification for the defendants that another party, a stranger, was also in the wrong."

The decision clearly was justifiable, for one important reason for the imposition of the duty not to cram the car as defendants did was the avoidance of dangers from careless or unavoidable jostling of passengers on the crowded platform.[26]

Glover v. *London & S. W. Ry. Co.*[27]—Plaintiff was wrongfully ejected by defendant's servants from a railway carriage. He left a pair of race glasses and they were lost. There was no evidence that plaintiff was not given reasonable opportunity to take them with him. It was held that defendant was not responsible for the loss. Inasmuch as they were left through plaintiff's forgetfulness or wish, and not because of the manner[28] in which he was ejected, the avoidance of the loss evidently was without the scope of the duty infringed.

Gilman v. *Noyes.*[29]—Defendant carelessly left down the bars of plaintiff's pasture, and plaintiff's sheep strayed away and were destroyed by bears. It was held that whether defendant was re-

[24](1867) 36 N. Y. 39, 93 Am. Dec. 490.

[25]At p. 41.

[26]Cf. Snyder *v.* Colo. Springs etc. Ry. Co. (1906) 36 Colo. 288, 8 L. R. A. (N. S.) 781.

[27](1867) L. R. 3 Q. B. 25.

[28]Though, of course, the concrete expulsion of plaintiff was a cause of the loss of the glasses.

[29](1876) 57 N. H. 627.

sponsible for the loss depended on whether the jury should find that "it was natural and reasonable to expect that if the sheep were suffered to escape they would be destroyed in that way." [30] The sheep were confined in order (among other reasons) to avoid the appreciable risks attendant upon permitting them to roam at large. If destruction by bears was a consequence so exceptional under the circumstances of time and place as not to be among these appreciable risks, the prevention of it ought not to be numbered among the purposes of defendant's infringed duty.[31]

Quigley v. *D. & H. Canal Co.*[32]—Defendant's locomotive approached a crossing without whistling. Plaintiff was driving his team over the tracks when he saw the train coming. To save himself from danger, he jumped from the wagon. The horses, released from control of their driver and frightened by the train, ran away and one of them was injured. The Court held that defendant was responsible for the injury. Clark, *J.*, expressed the reasons as follows: [33]

"The purpose of giving a warning before a railroad train or locomotive-engine comes to a crossing, as the learned judge very properly said in the general charge, is not only to prevent persons from driving on the track in front of the approaching train or engine, but also to give notice to travelers upon the highway, so that they may not approach within dangerous proximity to the train. The alleged neglect of this duty caused the driver of this wagon to go upon the track, and into the peril to which he was there seemingly exposed. The dropping of the lines and the leap from the wagon, according to the finding of the jury, were such acts as an ordinarily prudent person would have done to extricate himself from the threatened danger; and they may therefore be said to have been necessitated by the negligent conduct of the Company. It was the fright of the horses, and their abandonment by the driver, that caused the injury, but these causes were produced by the negligence of the defendant, who, without warning, ran the

[30] *Per* Cushing J., at p. 630.

[31] West *v.* Ward (1899) 77 Ia. 323, 42 N. W. 309; Nelson *v.* R. Co. (1882) 30 Minn. 74; Savage *v.* R. Co. (1884) 31 Minn. 419; Mo. Pac. Ry. Co. *v.* Eckel (1892) 49 Kan. 794; Atchison etc. R. Co. *v.* Jones (1878) 20 Kan. 527; Lawrence *v.* Jenkins (1873) L. R. 8 Q. B. 274; Halestrap *v.* Gregory L. R. [1895] 1 Q. B. 561; Sneesby *v.* Ry. Co. (1874) L. R. 9 Q. B. 263, (1875) L. R. 1 Q. B. D. 42. (The following generalization of Blackburn, J., L. R. 9 Q. B. D. at p. 267:—"The rule is sometimes difficult to apply, but in a case like the present this much is clear, that so long as the want of control over the cattle remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible"—is doubtless too sweeping.)

[32] (1891) 142 Pa. St. 338, 24 Am. St. R. 504.

[33] At p. 396.

engine into such dangerous proximity to the wagon as to produce this fright of the horses, and to oblige the plaintiff, who felt that he was in peril, to jump from the wagon, and let the horses go without control.[34]

Harrison v. *Berkley*.[35]—Defendant, in violation of a statute, sold whiskey to plaintiff's slave. Next morning the slave was found dead from drunkenness and exposure. The verdict established that "the drinking, intoxication, exposure, and death of the slave, were the natural and probable consequences of" defendant's wrongful act. It was held that defendant was responsible. Assuming that defendant owed plaintiff a duty not to sell the slave the whiskey, we should find no difficulty in agreeing with the decision, for certainly an object of the duty was the prevention of sequences such as that which produced the death of the slave.

Page v. *Bucksport*.[36]—Plaintiff's horse fell through a bridge which defendant had wrongfully left defective. Plaintiff was injured in attempting, with due care, to extricate the horse. It was held that defendant was responsible for the injury to plaintiff. Plaintiff was justified in trying to rescue his property from the predicament in which defendant's wrong had placed it. The injury was an incident of a careful attempt. Therefore it is fair to say that defendant ought not to have caused the predicament in order that such a contingency might have been avoided.

INDUCTIONS:—LEGAL DUTIES ALWAYS ARE IMPOSED FOR LEGAL PURPOSES. THE PROBLEM OF LEGAL CAUSE IS THE PROBLEM OF DELIMITING THE CONCRETE PURPOSES OF CONCRETE DUTIES.

What conclusions shall we draw from consideration of these cases? This much can be asserted with assurance and could be verified, if need were, by examination of all the decisions indexed in the digests:— Every duty is imposed for limited determinable ends. The purposes may be justifiable or not; practical or impractical; patent or difficult to define. Whatever they are, the ascertainment of them illumines and vivifies the duty. These statements seem axiomatic. What special bearing have they on our problem? In each case which we have examined, the question was whether the wrongful act or omission was "legally blamable"

[34]See also Jones *v.* Boyce (1816) 1 Starkie 493; Woolley *v.* Scovell (1828) 3 Mann. & Ryl. 105.

[35](S. C. 1847) 1 Strobh L. R. 525.

[36](1874) 64 Me. 51, 18 Am. R. 239.

for the damaging consequence. In each the question was clarified (was it not?) by examination of the purposes for which the infringed duty was imposed. In those decided against defendant, the prevention throughout of the concrete sequence which produced the damage was within the limits of the purposes for which the unperformed duty was imposed; in those decided in favor of defendant, it was not within those limits. Isn't the obvious induction sound? Can't we correctly say that a wrong is not the "legally blamable" cause of a concrete sequence if the prevention of that sequence did not fall within the purposes of the infringed duty; and that if it is not the "legally blamable" cause of the sequence, it cannot be the "legal" cause of any consequence of the sequence? This sounds reasonable.[37] Why should a defendant be responsible for occurrences entirely extraneous to the purposes of his duty? To hold him responsible would be to exact an arbitrary penalty beyond compensation for his wrong in the form of involuntary insurance. A more extended and detailed examination of cases than space permits will convince the doubtful that our generalization is not erroneous.[38]

Will the opposite induction hold true within the limits of our problem? Is a defendant responsible for any concrete sequence if the prevention of that sequence was within the purposes of his duty? Obviously, the answer *prima facie* should be "Yes." Otherwise there is an admission that a remedy will be denied a plaintiff for harm which by hypothesis defendant owed him the duty to prevent. Is there any principle, policy, or arbitrary rule within the bounds of our inquiry which further limits responsibility? The principles and rules concerning assumption of risk, contributory negligence, avoidable consequences, contributory illegality, and imputable contributory fault (and many other rules and principles) are guides to a determination of the existence, content, and purposes of concrete duties, and therefore do not combat the validity of our induction. Expressions or intimations to the effect that it is impracticable for Courts to trace back sequences to "remote" cause and that therefore "the law" arbi-

[37] We do not intelligently blame a person for an occurrence simply because it was a consequence of his morally wrongful act or omission; but because he ought to have conducted himself otherwise *in order that such a consequence* might have been prevented.

[38] Justifiable decisions burdening a wrongdoer with the risk of loss because of his wrong will be found either to come within our induction or to fall without the scope of our problem. But consider Stevens *v.* B. & M. R. R. (Mass. 1854) 1 Gray 277.

trarily cuts short the examination of the "chain of causation" at the "proximate cause," are found in the opinions of judges; but in so far as they are advanced to indicate a principle limiting legal responsibility, they are merely unconsidered paraphrases of Lord Bacon's famous gloss,

"it were infinite for the law to consider the causes of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking for any further degree,"

which has little value except as a literary relic of a famous man. Frequently, similar expressions betray a confusion of the principles of "legal cause" with those underlying the requirements concerning certainity of proof and certainty in the measurement of damages.[39] The various formulated "rules" that are common in the opinions of judges and which we shall have occasion to consider later, are only attempts to distinguish by generalizations the consequences which fall within from those which fall without the scope of a broken duty. My investigation has failed to disclose a defensible decision inconsistent with our second induction.[40]

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[39]See Sedgwick on Damages §§ 170-200.

Cooley on Torts (3rd Ed.) Vol. 1, p. 99 reads as follows:

"The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture where the uncertainty renders the attempt at exact conclusions futile."

Does not this betray a confusion of ideas? Whenever a requisite to maintenance of a plaintiff's claim or any part of it cannot be established with sufficient certainty, the plaintiff fails *pro tanto;* but because of the principles concerning certainty of proof, not because of any principle of proximate cause. In all the cases falling within the limits of our problem it is assumed that the connection of cause and consequence has been established. There is therefore no difficulty of establishing facts with a sufficient degree of certainty. To say that to attempt to trace the connection of cause and consequence beyond the proximate cause is to "enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile" is obvious error.

[40]Cases concerning only the measurement of compensation or the method of remedying the wrong must be distinguished from those within our problem. Also note that in many cases which might seem to indicate an exception to our induction on some grounds of policy, the effect of the decisions (for whatever reasons) was either that no relevant duty owed plaintiff had been violated, or that the avoidance of the consequence in question was not within the scope of the violated duty. By "purposes of a duty" is meant, of course, legal purposes. As legal duties are not necessarily coextensive with moral duties, so the scope of a legal duty may vary from the scope of a similar moral duty. Only those purposes which the Courts would vindicate are of importance in our discussion.

If we agree without mistake that these two generalizations are correct indications of the law, we have ascertained the full significance of the first division of our problem. We shall know in each case what determination will lead to a solution and shall be able to test and criticize intelligently results, proposed rules, and judicial opinions. It remains to inquire concerning the ascertainment of the purposes of a duty and the practicability of rules in this branch of the law.

(To be concluded.)[41]

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In cases in which the wrong involved is a simple breach of contract, we have a subsidiary limiting principle. The duty of performing a contract has the immediate object of securing to the obligee or beneficiary the subject-matter of the contract. Beyond this obvious end, other purposes of the obligee may be subserved by performance. Risk of loss is a very important item to a contractor when he considers an undertaking or estimates the compensation which he will demand. Therefore, it is unfair that the loss to which a breach exposes him should be increased because of peculiar purposes to which performance might have been turned, of which he had no reasonable warning when he entered into the contract. This is why the duty not to commit a certain concrete breach does not include among its purposes the prevention of such consequences as do not usually follow such a breach, unless the obligor had sufficient warning of them when he entered into the contract. See Hadley *v.* Baxendale (1854) 9 Exch. 341, 23 L. J. (N. S.) Exch. 179; Sedgwick on Damages, §§ 144-169.

[41]In the next number of this Volume.